

November 14, 2011

The Honorable Nerissa J. Cook
Deputy Assistant Secretary
Bureau of International Organization Affairs
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Nerissa:

The undersigned members of the International Postal and Delivery Services Advisory Committee would like to submit the following comments. We do not speak as a working group or other formal division of the IPODS, but as similarly minded persons appointed to the advisory group.

The five proposals submitted by Jim Campbell (the “Proposals”), when separated from the background educational memo submitted along with the proposals, are fairly straightforward. To simplify matters, we have removed them from the paper and attach them to this letter as an appendix. You will see that each is cast in the form of a UPU proposal, with proposed revision to UPU documents and explanatory notes. Only one of these is longer than two pages, including both text and explanatory comments.

The proposals are designed to let the U.S. fulfill its statutory mandate to advance pro-competitive, anti-discriminatory policies at the UPU relating to the international markets affected by UPU regulation. While they may not all be successful at the Doha Congress (if “success” is being measured by actually being adopted immediately), we submit that they are necessary steps toward reform of the Union. Reform is a slow process, but we would hope that the U.S. would be a leader in modernizing the Union to reflect the realities of today’s markets while preserving the mission of the UPU to provide for the global exchange of letter mail and parcels by designated operators.

Proposals 1 and 2 are the most substantive, and are mandated by the law of the U.S., as amended by the Postal Accountability and Enhancement Act (PAEA). They deal with the basic matters over which the UPU has regulatory authority – letter mail and parcels – and seek to level the playing field and eliminate anti-competitive rules that are vestiges of an earlier world in which postal systems were the main method of transporting documents and lighter-weight goods. Proposal 1 would do away with the price-fixing system of terminal dues and inward land rates – but only for those states designated as “industrialized countries.” Proposal 2 would remove the UPU obligation to provide special “postal customs” treatment for commercial items carried by designated operators, clearing the way for all countries to treat commercial articles in the same way for border crossing purposes, regardless of the carrier (public or private).

Two of the proposals are procedural – Numbers 3 and 5 – in that they seek to eliminate any doubt that the basic, government-to-government agreements within the UPU context are the Convention and the Agreements. They provide that Regulations (formulated by the Postal Operations Council) where they are to be binding on the governments (not just on operators) should be approved by the Council of Administration, so all provisions which would have the force of law must be considered by governmental representatives, not just operators. This would limit the burden of governmental representatives to the Congress by allowing them to focus on the provisions that become international law -- the relatively short Convention and Agreements - - and leave operational issues to those governing the operation of the global postal network (the commercial function of the UPU) to the operators, who should not be allowed to override national law or treaties with their operational provisions.

To further implement that separation of functions, the final proposal (Proposal 4) is not one that would be submitted to a UPU Congress as an amendment but a proposal for a joint reservation. The content of this reservation is similar to a declaration routinely adopted by the EU member countries and others. It recognizes that U.S. commitments under the General Agreements on Trade in Services and other trade agreements are superior to the UPU agreements. This is appropriate, given the fact that the GATS is the agreement defining market access for global companies, and allows the U.S. to acknowledge this role for the World Trade Organization.

All in all, we believe that these are provisions on which the U.S. should -- and must, under U.S. law -- exercise leadership, and we believe that a significant number of like-minded countries will follow. The provisions are “shovel ready”, in that they are already posed in standard UPU language and format. We would ask that the U.S. government put these forward for consideration at the next Congress.

Sincerely,

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Consultant

John Goyer
Vice President
Coalition of Service Industries
Advisory Committee Observer

Brad Smith
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Note: Organizations are listed for identification purposes only.

cc: Dennis Delehanty, Patricia Lacina

APPENDIX

PROPOSED DRAFT AMENDMENTS FOR THE UNIVERSAL POSTAL CONVENTION TO BE ADOPTED AT THE DOHA CONGRESS OF THE UPU (2012)

Proposal 1: Terminal dues and inward land rates among industrialized countries

Convention Article X1

Charges for delivery of letter post items and parcels conveyed between industrialized countries

1 This article shall apply to charges for the inward delivery of letter post items and parcels that are conveyed from an industrialized member country member country to industrialized member country and shall include, but not be limited to, letter post items and parcels conveyed by or on behalf of a designated operator, a non-designated operator, a mail consolidator, or an individual sender.

2 If a member country ensures that postal services for letter post items and parcels are provided to the general public and such services are provided under conditions of a legal monopoly or market dominance, then the member country shall ensure that the following principles are respected by any designated operator(s) appointed by it:

2.1 Access to the ensured services shall be provided at the same rates and under the same terms and conditions as available to national users of similar services for similar items, provided that such terms and conditions shall be relaxed if and to the extent they constitute an unreasonable barrier to access by foreign parties .

2.2 For the principal ensured services, the designated operator(s) shall establish linear tariffs that are reasonably equivalent to the rates available to national users for similar services and similar items, provided that such linear tariffs that also be available national users and designed so they do not cause unreasonable diversion from domestic rates.

2.3 Charges established under paragraphs 2.1 and 2.2 may include surcharges or discounts that are justified by differences in the costs of processing and delivering international items compared the costs of processing and delivering similar domestic items.

2.4 Designated operators may, by bilateral or multilateral agreement, apply other payment systems for the delivery of inward postal items provided that differences in rates or terms and conditions from equivalent national services shall be justified by differences in costs incurred.

2.5 The rates, discounts, and surcharges for inward postal delivery services listed above shall be transparent and shall not be unjustly or unreasonably discriminatory.

2.6 No letter post item or parcel may be denied delivery, surcharged,

otherwise given less favorable treatment on the basis of the country of origin.

3 Each member country shall designate an impartial national regulatory body to ensure compliance with this article, and such regulatory body shall be separate from, and not accountable to, any designated operator or non-designated operator.

4 Any member country not included in paragraph 1 may participate in the application of this article by submitting a written declaration to Postal Operations Council and providing reasonable assurances that it will ensure appropriate implementation of this article.

5. Member countries included in paragraph 1 are set out in Annex A to the Convention. The International Bureau shall maintain a current list of member countries who subscribe to this article pursuant to paragraph 4.

Explanatory notes

1) This article is derived from (i) current Convention Arts 27 (terminal dues general provisions) and 28 (terminal dues target system); (ii) EU Postal Directive Article 13 (principles for terminal dues applicable to universal service between EU member countries); and (iii) the 2003 decision of the EU Commission defining public interest criteria for the Reims II agreement. Commission Decision of 23 October 2003, Reims II renotification, OJ L56, 24 Feb 2004, p. 76.

2) Paragraph 1 states that the scope of this article is, in effect, the “target” countries of the current Convention, i.e., the countries affected by current Article 28. The term “industrialized” is used instead of “target” because it is not intended that all other member countries must some day come under this article.

3) Paragraph 2.1 is essentially the same as current Article 27(4)(2).

4) Paragraph 2.2 provides for linear equivalents for all principal domestic universal services to avoid the possibility that a country might choose to linearize only a costly domestic universal service.

5) Paragraph 2.6, like the European Commission’s Reims decision, forbids resort to the anti-re-mail provisions of the Convention where the designated operator is reasonably compensated for delivery.

6) Paragraph 3 requires appointment of an impartial regulatory body to ensure implementation of paragraph 2. This requirement for an impartial regulatory body is similar to Article 22 of the EU Postal Directive, the principles set out in the “reference paper” of WTO’s Agreement on Basic Telecommunications, and the plurilateral request on postal and courier services of the U.S., the EU, and others in the Doha Round of the WTO.

7) In paragraph 4, the option for non-industrialized countries to join the system is essentially the same as provided in current Article 27(12).

Proposal 2: Revised customs controls for postal items

Convention Article X2 Customs control

1 Designated operators of the countries of origin and destination shall be authorized to submit items to customs control according to the legislation of those countries.

2 The Postal Operations Council is authorized to prescribe standard forms, electronic message formats, or other documentation requirements for senders to use in providing information relating to the customs control of a postal item in the country of origin or the country of destination.

2.1 Designated operators shall take all reasonable efforts to ensure that information provided by senders is accurate and complete.

2.2 The Postal Operations Council may adopt such rules it deems appropriate to ensure the privacy and confidentiality of information provided by senders.

2.3 Member countries shall not hold designated operators liable for information provided by senders relating to customs control or for decisions taken by customs authorities on examination of items submitted to customs control, provided that designated operators may voluntarily accept such liability.

2.4 Regulations adopted by the Postal Operations Council relating to this article shall be binding on member countries if approved by the Council of Administration.

3 Similar postal items which are accepted for conveyance by a designated operator in an origin country shall be entitled to customs control by authorities in the destination country in the same manner.

4 This article shall not apply to the customs control of commercial items unless the conveyance of such commercial items is reserved by national law for a provider of universal postal services in the country of origin.

4.1 A “commercial item” means any good exported/imported in the course of a business transaction, whether or not they are sold for money or exchanged.

Explanatory notes

- 1) Paragraph 1 is essentially the same as current Article 18(1).
- 2) In current Regulation RL 152 the POC prescribes forms for customs related

information provided by senders and for the privacy of such information. However, no provision in the Convention authorizes the POC to adopt such regulations. Paragraph 2 authorizes such regulations.

- 3) Paragraph 2.3 is based on current Article 22(3): "Member countries and designated operators shall accept no liability for customs declarations in whatever form these are made or for decisions taken by the Customs on examination of items submitted to customs control." Unlike the current Convention, under the proposal a designated operator may voluntarily accept liability under customs laws. This flexibility might enable designated operators to access better or faster customs procedures.
- 4) Paragraph 2.4 requires that customs regulations adopted by the POC must be approved by the Council of Administration. Additional review by the CA is permitted by General Regulation Article 104(9)(2) which defines the rulemaking authority of the POC as follows: "to revise the Regulations of the Union within six months following the end of the Congress *unless the latter decides otherwise*; in case of urgent necessity, the Postal Operations Council may also amend the said Regulations at other sessions; in both cases, the Operations Council *shall be subject to Council of Administration guidance on matters of fundamental policy and principle* [emphasis added]."
- 5) Paragraph 3 is intended to ensure that customs authorities in the destination country treat all incoming postal items received from a designated operator in a non-discriminatory manner. This would disallow a customs authority from discriminating between postal items that are shipped directly to a destination country and those that are shipped via an intermediary hub. It would also prohibit a customs authority from discriminating against postal items shipped to a destination country from an ETOE.
- 6) Paragraph 4 excludes customs control of commercial items from this article. The definition of commercial item is taken from current UPU form CN 23. Under current practice, it is the responsibility of customs authorities in the destination country to determine what is a "commercial item," and this responsibility is unchanged by the proposal. Paragraph 4 does *not* prohibit individual member countries from allowing designated operators to use UPU postal customs documents in the application of its customs laws.

Proposal 3: POC to authority to adopt Regulations implementing the Convention

Convention Article X3

Regulations implementing the Convention

1 The Postal Operations Council is authorized to adopt such Regulations as may be necessary to implement the provisions of this Convention.

1.1 Except as provided in paragraph 1.2, Regulations which establish mandatory or voluntary operational standards for designated operators shall become effective upon approval of the Postal Operations Council.

1.2 Regulations which are binding on member countries or which are determined by the Council of Administration to involve matters of fundamental policy or principle shall become effective upon approval of the Council of Administration.

2 Provisions of the Regulations shall not —

2.1 derogate from the legislation of any member country in respect of anything which is not expressly provided for by this Convention;

2.2 derogate from the commitments of any member country pursuant to the agreements of the World Trade Organization or the World Customs Organization.

3 Except for the provisions of Restricted Unions and Special Agreements established under Article 8 of the Constitution, this Convention and the Regulations adopted pursuant to this article shall constitute the entire agreement between member countries with respect to the subject matter of this agreement and shall supersede all prior agreements, conventions, regulations, declarations, or other measures.

Explanatory notes

1) Paragraph 1.1 generally authorizes the POC to adopt Regulations which are binding on designated operators without further review by the CA. Almost all Regulations should be covered by this authority.

2) Paragraph 1.2 requires further review and approval by CA for certain POC Regulations. Additional review by the CA is permitted by General Regulation Article 104(9)(2) which defines the rulemaking authority of the POC as follows: “to revise the Regulations of the Union within six months following the end of the Congress *unless the latter decides otherwise*; in case of urgent necessity, the Postal Operations Council may also amend the said Regulations at other sessions; in both cases, the Operations Council *shall be subject to Council of Administration guidance on matters of fundamental policy and principle*

[emphasis added].”

3) Paragraph 2.1 provides that the Regulations may not override national law unless they implement a provision of the Convention which expressly overrides national law. This paragraph is derived from Constitution Article 24 which says, “The provisions of the Acts of the Union shall not derogate from the legislation of any member country in respect of anything which is not expressly provided for by those Acts.” The underlying premise is that only the Convention, which is approved by governments, and not the Regulations may derogate from national legislation.

4) Paragraph 2.2 says that the Regulations cannot derogate from provisions agreed by member countries in the agreements of the World Trade Organization or the World Customs Organization. This appears to be a reasonable limitation on the rulemaking authority of the POC and CA. This limitation partially overlaps Proposal 4.

Proposal 4: Primacy of GATS to the UPU Convention

Final Protocol to the Convention Article X1

Relationship to the General Agreement on Trade in Services

The [list of countries], and United States of America shall apply provisions of this Convention in accordance with their obligations pursuant to the General Agreement on Trade in Services (GATS) and other agreements of the World Trade Organization and reserve the right to grant, either unilaterally or in the context of specific commitments made under such agreements, market access to the full extent contemplated by the GATS for all services (whether governmental and non-governmental) for the conveyance of all types of items and goods weighing up to 20 kg except where such services are reserved by national law. In case of conflict between provisions of this Convention and agreements of the World Trade Organization, the latter shall have precedence.

Explanatory notes

1) The wording in the first portion of this reservation closely follows the “declaration” of the EU member states in signing all UPU Conventions since 1994. The EU declaration applicable to the current UPU Convention says:

The delegations of the member countries of the European Union declare that their countries will apply the Acts adopted by this Congress in accordance with their obligations pursuant to the Treaty establishing the European Community and the General Agreement on Trade in Services (GATS) of the World Trade Organization.

Similar declarations with respect to the primacy of GATS were also filed by the European Economic Area countries (Iceland, Liechtenstein, Norway), Canada, and New Zealand.

These declarations do not, however, appear to have the legal effect of reserving the right of the declaring countries to give precedence of their obligations under the GATS over inconsistent provisions in the Universal Postal Convention. To do so, a UPU member must record a “reservation”. See, James I. Campbell Jr. and WIK Consult, “Study on the External Dimension of the EU Postal Acquis” (Nov. 2010), p. 172-73. Hence the proposal is set out in the form of “reservation”.

2) The second part of the sample reservation — “to grant, either unilaterally or in the context of specific commitments made under that agreement, . . .” — is intended to indicate the right, indeed to suggest an intention, to go beyond the bare minimum required by GATS and to allow full market access for competitive services. At the same time, such commitments, whether unilateral or multilateral,

do not become part of the UPU Convention or subject to UPU implementation. The scope of such commitments would be up to the various countries, either unilaterally or in the context of future trade negotiations.

3) Formally, a reservation to a UPU Convention must be accepted by other parties to become effective. It must be filed at the end of Congress. Other parties can file a “counter-reservation” refusing to accept a reservation. Nonetheless, in light of the US/EU/Japan/NZ plurilateral request in 2006, it appears possible to develop a reservation that is acceptable to the EU and other industrialized countries.. If most industrialized countries subscribe to this reservation, it will be effective among these countries even if developing countries wish to opt out by filing a counter-reservation. Such a reservation would help to open the door for market access.

Proposal 5: POC to authority to adopt Regulations implementing the Postal Payment Services Agreement

Postal Payment Services Agreement Article 27
Final Provisions

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4 Regulations adopted by the Postal Operations Council to implement the provisions of this Agreement shall not exceed the authority expressly granted in this Agreement.

4.1 Except as provided in paragraph 4.2, Regulations which establish mandatory or voluntary operational standards for designated operators shall become effective upon approval of the Postal Operations Council.

4.2 Regulations which are binding on member countries or which are determined by the Council of Administration to involve matters of fundamental policy or principle shall become effective upon approval of the Council of Administration.

5 Provisions of the Regulations shall not —

5.1 derogate from the legislation of any member country in respect of anything which is not expressly provided for by this Agreement;

5.2 derogate from the commitments of any member country pursuant to the agreements of the World Trade Organization;

6 Provisions of the Regulations shall be fully consistent with the policies, rules, and standards adopted for similar or substantially similar financial services by the international financial services regulatory infrastructure, including, but not limited to, the Financial Stability Board, the Bank for International Settlements, the International Organization of Securities Commissions, and the International Association of Insurance Supervisors. To ensure consistency, the Council of Administration and the Postal Operations Council, as appropriate, shall consult regularly with appropriate bodies of the international financial services regulatory infrastructure.

7 Except for the provisions of Restricted Unions and Special Agreements established under Article 8 of the Constitution, this Agreement and the Regulations adopted pursuant to this article shall constitute the entire agreement between member countries with respect to the subject matter of this agreement and shall supersede all prior agreements, conventions, regulations, declarations, or other measures.

Explanatory notes

1) This proposal is similar to Proposal 3, amending the Universal Postal Convention. In essence, this proposal states that the Postal Operations Council may not, in Regulations implementing the Postal Payment Services Agreement, (1) exceed the scope of that Agreement, (2) override national law or the GATS, or (3) promulgate policies or standards that inconsistent with the international standards applicable to similar financial services offered by non-designated operators.